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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 375

GREAT AMERICAN INDEMNITY COMPANY, a corporation

and

JO-DEL RESTAURANT, INC., a corporation, *Petitioners*

v.

THEODORE BRITTON, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August, 1961

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Great American Indemnity Company and Jo-Del Restaurant Inc. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Reprinted as Appendices to this Petition, with the letter designations noted, are: (A) Opinion of District Judge Holtzoff of the United States District Court for the District of Columbia (reported at 186 F. Supp.

938); (B) Opinion of the United States Court of Appeals for the District of Columbia Circuit, reversing Judge Holtzoff's decision (reported at 290 F.2d 381) together with the dissenting opinion of Circuit Judge Bastian; (C) Order of the United States Court of Appeals for the District of Columbia denying petition for rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals was entered in the above entitled action on May 4, 1961. The Order Denying Petition for Rehearing was entered on June 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a workmen's compensation case, the technicalities of formal pleadings are required in framing issues before the Deputy Commissioner.

2. Whether, in a workmen's compensation case, issues of fact are sufficiently raised by the parties if they are submitted to the Deputy Commissioner in writing in advance of the hearing on forms prescribed by the Bureau of Employees' Compensation.

3. Whether a night club musician whose services are retained on a per diem basis is an employee or an independent contractor.

4. Whether, in a workmen's compensation case, an employee is engaged in the course of his employment while he is loitering on the employment premises for personal reasons after completing his employment duties.

STATUTE INVOLVED

The provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 901, *et seq.*) as applied to employment in the District of Columbia (36 D.C. Code 501, 502), and which are pertinent to this case are as follows:

> Sec. 2. When used in this Act— . . .
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment . . .
>
> (11) "Death" as a basis for a right to compensation means only death resulting from an injury . . .
>
> Sec. 14. . . .
>
> (d) If the employer controverts the right to compensation he shall file with the deputy commissioner . . ., a notice, in accordance with a form prescribed by the commission [Bureau of Employees' Compensation] stating that the right to compensation is controverted, . . ., and the grounds upon which the right to compensation is controverted. . . .
>
> Sec. 23. (a) In making an investigation or inquiry or conducting a hearing the deputy commission shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. . . .

STATEMENT OF THE CASE

Fisher and Mainer were musicians at the Jo-Del Restaurant in the District of Columbia. On December 27, 1957 they completed their services for the evening at 1:30 o'clock a.m. and were paid off by the proprietor.

By that time the proprietor had discontinued all customer business and had locked his doors for the night. After being paid off Fisher and Mainer remained on the premises seated at the customers' side of the bar for purely personal reasons. Approximately one-half hour later two disgruntled customers returned to the restaurant, broke into the premises with the intention of committing an assault on the proprietor and, in a drunken orgy of gunfire, they killed Fisher and Mainer.

The dependents of the deceased filed claims for compensation under the District of Columbia Workmen's Compensation Law (Longshoremen's and Harbor Workers' Compensation Act). The employer and its insurance carrier (Petitioners herein) controverted the claims.

In their written Answers and Notices of controversion filed with the Bureau of Employees' Compensation on forms provided by the Bureau for such purpose (Exhibits "A", "B" and "C" to the Supplemental Appendix in the record below), the Petitioners raised the issues that (1) no employer-employee relationship existed between Jo-Del Restaurant Inc. and the alleged employees at the time of their injuries; (2) at the time of their injuries the employees were not performing services growing out of and incidental to their alleged employment; and (3) the deaths of the alleged employees did not result from accidental injuries arising out of or during the course of their employment.

Hearings on the claims were held by the Deputy Commissioner who thereafter made findings that the deceaseds were employees and that the injuries resulting in their death arose out of and during the course

of their employment. Accordingly, the Deputy Commissioner awarded compensation to the claimants.

Thereafter the Petitioners brought an action in the United States District Court for the District of Columbia seeking to set aside the awards. The Deputy Commissioner (Respondent herein) made a Motion for Summary Judgment on the ground that his findings as to the issues raised were supported by substantial evidence in the record and that the dependents were entitled to judgment as a matter of law. District Judge Holtzoff heard argument on the Motion and, on September 20, 1960, denied the Deputy Commissioner's Motion for Summary Judgment. Judge Holtzoff further directed the entry of judgment for Petitioners based upon a lengthy opinion in which he found that the deceased's injuries were not sustained during the course of their employment.

An appeal was thereupon taken by the Deputy Commissioner to the United States Court of Appeals for the District of Columbia Circuit. A panel of that Court consisting of three judges reversed the decision of the District Court, with one judge dissenting.

The majority opinion of the Court of Appeals held that the issue as to whether the homicides arose out of and in the course of employment had not been properly raised or presented by Petitioners before the Deputy Commissioner and therefore the District Court had no authority to hear and determine such issue.

In his dissenting opinion, Circuit Judge Bastian noted that such issue had been properly raised in the proceedings before the Deputy Commissioner, that testimony on this issue had been received, and that the issue was in fact resolved by a finding of the Deputy

Commissioner on the subject. Judge Bastian also noted that it was "unfortunate that in compensation cases such a strict view on the issues should be taken as appears in the majority opinion".

Petition for rehearing *en banc* was timely filed and denied by the Court of Appeals on June 5, 1961. Chief Judge Miller and Circuit Judge Bastian voted to grant the petition.

REASONS FOR GRANTING THE WRIT

I.

This case presents the important question of the degree of formality necessary to raise an issue in a workmen's compensation case as to whether an injury was sustained in the course of employment.

Section 23(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 923 (a)) provides that the Deputy Commissioner "shall not be bound by . . . technical or formal rules of procedure . . . but may make such investigation or inquiry or conduct hearings in such manner as to best ascertain the rights of the parties."

This statutory provision has been interpreted by this Court to mean that the Deputy Commissioner is not bound by such technical rules of evidence or procedure which would be applicable to trials in Court. See *Crowell* vs. *Benson*, 285 U.S. 22, at page 48. Despite the above statutory provision the Court of Appeals deliberately avoided the substantive issues involving the basic merits of the claims and instead ruled solely on the technicality that such issues had not been properly raised before the Deputy Commissioner. Clearly, this is contrary to the statutory requirement that the

"rights of the parties" be ascertained without regard to "technical or formal rules of procedure."

Unfortunately, the precedent established by the decision of the Court of Appeals, unless overruled, will affect all future workmen's compensation cases in such a manner so that the parties in order to be fully protected will have to resort to highly technical procedural steps not presently contemplated or required by the statute.

II.

The Court of Appeals further erred when it held that the "course of employment" issue had not in fact been raised in the proceedings before the Deputy Commissioner. Indeed, the dissenting opinion of Circuit Judge Bastian quotes from the employer's Answer and Notice to the Deputy Commissioner and from the Notice of Hearing itself to show that this issue was clearly raised in the proceedings before the Deputy Commissioner.

An unfortunate precedent is thus established by the Court of Appeals which will affect future workmen's compensation proceedings in that parties will not know whether issues raised by the pleadings on forms provided by the Bureau will in fact be heard or determined by the Deputy Commissioner. In the instant case the "course of employment" issue was clearly raised by the formal pleadings filed with the Deputy Commissioner on forms provided by the Bureau for such purpose. Nevertheless, the Court of Appeals ruled that such issue was not before the Deputy Commissioner to determine.

III.

The Court of Appeals further erred in ruling that the District Court improperly considered the "course of employment" issue, *sua sponte*.

Assuming that the issue had not been raised before the Deputy Commissioner with such strict formality as the majority opinion seems to think was necessary, it was nevertheless not improper for the District Court to raise such issue *sua sponte* when the record contained testimony on the issue and the Deputy Commissioner entered findings of fact with respect to such issue. Under such conditions it is not only proper but mandatory that the District Court take notice of such issue and determine whether the findings of fact are indeed supported by substantial evidence of record. Any other rule would make a mockery of the requirement that findings of fact must be supported by substantial evidence.

In reviewing the evidence taken before the Deputy Commissioner it was entirely proper for the District Court to consider any issue upon which there was evidence in the record in order to determine whether the Compensation Order was or was not entered in accordance with law. When considering the record as a whole, as it must be under *O'Leary* vs. *Brown-Pacific-Maxon*, 340 U.S. 504, the reviewing Court must determine whether all findings of fact are supported by substantial evidence, and if they are not so supported then such findings must be set aside. Indeed, where the finding of the Deputy Commissioner is *contrary* to the only evidence of record on the subject it would be grave error to affirm such finding on judicial review. In this connection it is again submitted that the statute requires an ascertainment of the rights of the parties and not a subservience to technical formalities.

IV.

The substantive issue in the instant case involves an important question of novel impression in this Court under the Longshoremen's and Harbor Workers' Compensation Act.

The very able opinion of District Judge Holtzoff below points out the weight of authority under workmen's compensation laws of various states to the effect that an employee who tarries on the employment premises for personal reasons after his work is done is no longer engaged in the course of his employment. Accordingly, Judge Holtzoff held that Fisher's and Mainer's injuries in the instant case were not sustained in the course of their employment.

This question arises frequently in the adjudication of workmen's compensation cases at the administrative level under the Longshoremen's Act and other related federal statutes. (District of Columbia Compensation Act, 36 D.C. Code 501, *et seq*, and Defense Bases Act, 42 U.S. Code 1651, *et seq.*).

A determination by this Court is necessary to establish an appropriate precedent for adjudication of all such cases in the future, particularly in view of the fact that conflicting views have been expressed below in this case on this legal question and that the Court of Appeals has avoided the issue entirely.

CONCLUSION

For all of the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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